Supreme Court, U.S.
FILED

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No. 10-785

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In The

Supreme Court of the United States

MEGAN KRAINSKI,

Petitioner,

v.

THE STATE OF NEVADA, ex rel. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, on behalf of the UNIVERSITY OF NEVADA, LAS VEGAS, a Political Subdivision of the State of Nevada, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Is the heightened pleading standard imposed on federal civil rights claims by the Ninth Circuit – in conflict with decisions from other courts of appeals – contrary to this Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)?

2.

Is the refusal to allow a plaintiff to amend her complaint, when the plaintiff has established that additional facts exist which would make the claims plausible, contrary to this Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962), particularly when the Foman Factors were not applied and the court misapprehended the facts?

3.

Has this Court's rulings in *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) altered the availability of Rule 15(a) relief to a plaintiff?

RULE 14.1(b) STATEMENT

A list of parties to the proceeding in the court whose judgment is the subject of the petition is as follows:

Plaintiff-Appellant and Petitioner: Megan Krainski.

Defendants-Appellees and Respondents: THE STATE OF NEVADA, ex rel. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, on behalf of the UNIVERSITY OF NEVADA, LAS VEGAS; a Political Subdivision of the State of Nevada; REBECCA MILLS, individually and as Vice President for Student Life of the University of Nevada, Las Vegas; RICHARD CLARK, individually and as Director of Student Conduct and Residential Life of the University of Nevada, Las Vegas; PHILLIP BURNS, individually and as Senior Student Conduct Officer of the University of Nevada, Las Vegas; NANNETTE JIMENEZ, individually and as a Student Conduct Officer of the University of Nevada, Las Vegas; SUSAN M. CARRASCO, individually and as Assistant General Counsel of the University of Nevada, Las Vegas; TYREE PINI, individually and as Assistant Residential Life Coordinator; LESLIE WALLENFELDT, individually and as Residential Life Coordinator of the University of Nevada, Las Vegas; OFFICER BRETT GOFF, P#302, individually and as a police officer with the University of Nevada, Las Vegas Police Department; OFFICER L. TRAMPOSCH,

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P#312, individually and as a police officer with the University of Nevada, Las Vegas Police Department; OFFICER J. CULVER, P#309, individually and as a police officer with the University of Nevada, Las Vegas Police Department.

Defendant in District Court: KENYA POLEE, individually.

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PETITION FOR WRIT OF CERTIORARI

Megan Krainski respectfully petitions for writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel opinion of the U.S. Court of Appeals for the Ninth Circuit, dated August 2, 2010, is officially reported at 616 F.3d 963 (9th Cir. 2010) and is reproduced at App. 1-22.

The opinion and order of the U.S. District Court for the District of Nevada, dated October 20, 2008, is reproduced at App. 23-27.

The order of the U.S. Court of Appeals for the Ninth Circuit denying further review and rehearing en banc, dated September 10, 2010, is reproduced at App. 28-29.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit sought to be reviewed was entered on August 2, 2010. The order denying rehearing en banc was entered on September 10, 2010. The petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 & 13.3 because it is being filed within 90 days after the denial of a timely petition for rehearing. This Court has jurisdiction to review the

judgment of the U.S. Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provision involved is 42 U.S.C. § 1983, which states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is an action for civil rights violations pursuant to 42 U.S.C. § 1983, and pendent state tort claims. On April 2, 2008, Petitioner filed a complaint in this U.S. District Court for the District of Nevada.

On June 9, 2008, Respondents the State of Nevada, ex rel. Board of Regents of the Nevada System of Higher Education, on behalf of the University of Nevada, Las Vegas; a Political Subdivision of the State of Nevada ("Defendant University") and Rebecca Mills, individually and as Vice President for Student Life of the University of Nevada, Las Vegas; Richard Clark, individually and as Director of Student Conduct and Residential Life of the University of Nevada, Las Vegas; Phillip Burns, individually and as Senior Student Conduct Officer of the University of Nevada, Las Vegas; Nannette Jimenez, individually and as a Student Conduct Officer of the University of Nevada, Las Vegas; Susan M. Carrasco, individually and as Assistant General Counsel of the University of Nevada, Las Vegas; Tyree Pini, individually and as Assistant Residential Life Coordinator; Leslie Wallenfeldt, individually and as Residential Life Coordinator of the University of Nevada, Las Vegas; Officer Brett Goff, P#302, individually and as a police officer with the University of Nevada, Las Vegas Police Department; Officer L. Tramposch, P#312, individually and as a police officer with the University of Nevada, Las Vegas Police Department; Officer J. Culver, P#309, individually and as a police officer with the University of Nevada, Las Vegas Police

Department ("University Defendants") filed a Motion to Dismiss Plaintiff's Complaint. On July 11, 2008, Plaintiff filed an Opposition to Motion to Dismiss. On July 25, 2008, Defendant University and University Defendants filed a Reply to Plaintiff's Opposition to Motion to Dismiss.

On October 14, 2008, the District Court, before Judge James C. Mahan, held a hearing on Defendants' Motion to Dismiss. Judge Mahan granted in part, Defendants' Motion to Dismiss, dismissing Plaintiff's federal claims under 42 U.S.C. § 1983, including claims alleging violations of due process, unlawful arrest and imprisonment, and unlawful search and seizure. App. 23-27. However, the District Court denied Defendants' Motion to Dismiss numerous state tort claims, but declined jurisdiction of those claims. *Id.* It is those federal § 1983 causes of action, dismissed pursuant to the October 20, 2008, order, which Petitioner appealed to the U.S. Court of Appeals for the Ninth Circuit. Petitioner's state claims continue to be litigated in a Nevada state court.

The District Court provided little analysis or explanation of its decision. *Id.* Moreover, the District Court did not consider a request by the Petitioner to amend her complaint, and did not address this request in its order, simply granting the motion to dismiss "with prejudice." App. 26.

On December 3, 2009, the Ninth Circuit panel held an oral argument on the appeal, and issued a decision on August 2, 2010. *Krainski v. Nevada ex rel.*

Bd. of Regents of Nevada System of Higher Educ., 616 F.3d 963 (9th Cir. 2010). The decision of the panel sets forth a heightened pleading requirement for the Petitioner's 42 U.S.C. § 1983 claim against the University officials. The panel stated that Petitioner "conceded that there were no new facts that she would include in the complaint" to overcome its perceived shortcomings, which is contrary to counsel's statements at oral argument. *Id.* at 972. In fact, Petitioner's counsel stated:

> We certainly are aware of many more facts now than we were when we first drafted the complaint. So essentially, the allegations we could add to the complaint at this point is to be more specific about the actual conspiracy that took place, who it occurred between, what school officials were actually involved in this.

Id. at 973.

In a strongly worded dissent by Judge Betty B. Fletcher, she states that the panel and district court erred by dismissing Petitioner's Fourth Amendment claim and abused its discretion by dismissing the complaint without leave to amend. *Id.* at 972-973.

Judge Fletcher opined that the panel's decision is in conflict with this Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 1950 (2009), in that Petitioner "alleges more than simply that UNLV police lacked probable cause to arrest her. She alleges in some detail the factual circumstances under which

the arrest took place." *Krainski* at 972. "She also alleges facts that explain why the police lacked probable cause" within the body of the complaint, thus fully complying with Federal Rule of Civil Procedure 8(a) and sufficient enough "to survive a motion under Rule 12(b)(6)." *Id.* at 972-973.

Judge Fletcher continued that the panel's upholding of the dismissal without leave to amend is also improper as it is not clear, upon *de novo* review, that the complaint could not be saved by any amendment, as set forth in *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). *Krainski* at 973. Judge Fletcher argued that due to the panel overlooking Petitioner counsel's statement that there are additional allegations that could be pled to save the complaint, the panel's decision directly conflicts with *Thinket Ink Info Res., Inc. Krainski* at 973.

Additionally, Judge Fletcher pointed out that the panel's decision is contrary to the Ninth Circuit's decision in *Baldwin v. Placer County*, 418 F.3d 966, 970-71 (9th Cir. 2005), which clearly sets forth that when police officers know or should have known that the allegations against an accused are false, there is no probable cause to arrest the accused and an arrest at that point is a violation of the Fourth Amendment. *Krainski* at 972.

On August 18, 2010, Petitioner timely filed a Petition for Rehearing En Banc or for Panel Rehearing. On September 10, 2010, the Ninth Circuit issued an

order denying the petition by a vote of 2-1, with Judge Fletcher voting in favor of granting the petition. App. 28-29.

REASONS FOR GRANTING THE PETITION

In affirming the District Court's enhanced pleading requirement for civil rights cases, and refusing to allow Petitioner to amend her complaint when clearly the complaint could have been saved by amendment, the Ninth Circuit has decided an important federal question in a way that conflicts with this Court's decisions regarding pleading requirements and pleading amendments.

Not only does the decision of the Ninth Circuit impact the application of Federal Rule of Civil Procedure 12(b)(6), Rule 8(a), and Rule 15(a), but how those rules are specifically applied to federal civil rights claims, brought pursuant to 42 U.S.C. § 1983. This is a question of federal law that has not been, but should be, settled by this Court in order to provide definitive and final guidance on this issue.

This Court should grant certiorari to address an issue affecting one of the most common types of civil cases filed in our federal courts and to enable uniform application of the standards set forth by this court in *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).

A. This Court Should Grant Certiorari To Determine Whether The Ninth Circuit Has Imposed A Heightened Pleading Standard For Claims Brought Under 42 U.S.C. § 1983.

1. The Allegations Pled.

Petitioner Megan Krainski brought an action for civil rights violations pursuant to 42 U.S.C. § 1983, including claims alleging violations of due process, unlawful arrest and imprisonment, and unlawful search and seizure. In the Fall 2007, Krainski enrolled as a student at the University of Nevada Las Vegas and resided in UNLV's campus residential housing with Respondent Kenya Polee. Polee was a prominent student-athlete at UNLV and was listed on the University's website as "the top long jumper for the Rebels . . . among the top long jumpers in the MWC (Mountain West Conference)."

On September 10, 2007, Krainski met with University employee, Respondent, Leslie Wallenfeldt, and advised her of continuous and unyielding harassment and threats made by Polee to Krainski. Rather than conducting an investigation and commencing disciplinary actions against Polee, in an attempt to protect their star athlete, Wallenfeldt and Respondent, Tyree Pini, informed Polee of Krainski's allegations against her. Before Krainski had an opportunity to file a formal complaint against her roommate, Pini, Wallenfeldt and Polee conspired to fabricate a story about Petitioner attempting to attack Polee with a pair of scissors.

Pini, Wallenfeldt, and Polee contacted UNLV Police and made false statements to the arriving officers, Respondents, Brett Goff, L. Tramposch, and J. Culver, in an attempt to have Krainski arrested. The UNLV Police officers made no investigation into Polee's claim that Krainski attacked her with a pair of scissors, and no physical evidence of an attack existed whatsoever. As such, Goff, Tramposch, and Culver knew, or should have known, the allegations made by Respondent Polee were false, but still arrested Krainski for the alleged crime of Assault with a Deadly Weapon in order to further the conspiracy to protect UNLV's star track athlete. The officers arrested Krainski and incarcerated her at the Clark County Detention Center, causing her to lose her liberty and causing severe psychological trauma and physical injury. The criminal charges against Krainski were eventually dismissed in January 2008.

On April 2, 2008, Krainski filed a Complaint in this case setting forth the factual circumstances under which her arrest took place, which showed the Respondents violated Krainski's Fourth Amendment rights. Specifically, the Complaint alleged:

> 27. On September 11, 2007, Defendants WALLENFELDT and PINI contacted Defendant POLEE, without Plaintiff's consent and in breach of confidentiality, and informed her of the allegations made by Plaintiff, and conspired with Defendant POLEE to fabricate a story about Plaintiff attempting to attack POLEE with a pair of scissors, all before

> Plaintiff would have an opportunity to file a formal complaint against Defendant POLEE.
>
> 28. Defendants WALLENFELDT, PINI, and POLEE then contacted UNLV Police and made false statements to police officer in an attempt to have Plaintiff arrested.
>
> 29. Defendant Officers GOFF, TRAMPOSCH, and CULVER, knew, or should have known, that the allegations made by Defendant POLEE were false, but arrested Plaintiff for the alleged crime of Assault with a Deadly Weapon.
>
> 30. Prior to making the arrest, Defendant Officers GOFF, TRAMPOSCH, and CULVER did not conduct any investigation into the claims made by Defendant POLEE, and had no probable cause or warrant to arrest Plaintiff.

Defendant University and University Defendants filed a Motion to Dismiss Plaintiff's Complaint in the District Court, which granted Defendants' Motion to Dismiss Plaintiff's federal claims under 42 U.S.C. § 1983. App. 23-27.

The Ninth Circuit panel affirmed the District Court's decision. *Krainski v. Nevada ex rel. Bd. of Regents of Nevada System of Higher Educ.*, 616 F.3d 963 (9th Cir. 2010). Judge Thomas wrote the opinion, which was joined by Judge Smith, which sets forth a heightened pleading standard for Krainski's § 1983 claims, which is not required under the Federal Rules of Civil Procedure, and is inconsistent with prior

holdings of this Court, and several other Circuit Courts of Appeal.

2. The Panel's Decision Is In Conflict With This Court's Pleading Requirement For A § 1983 Claim For Violation Of Fourth Amendment Rights, And Actually Creates A Heightened Pleading Standard In The Ninth Circuit For Civil Rights Cases.

Although the Petitioner set forth the elements of her claim against the UNLV officers for violation of her Fourth Amendment right to be free from warrantless arrest without probable cause, and that the officers knew or should have known probable cause to arrest Petitioner was not present, in addition to her due process claims, the panel found that this pleading did not satisfy the pleading requirements when the officers raised the defense of qualified immunity. *Krainski* at 969. In the decision of the panel, Judge Thomas stated that Petitioner failed to allege in her complaint or at oral argument any facts suggesting that any of the officers had a reason to suspect the falsity of the statements made by the victim and two other university employees. *Id.* The panel stated that Petitioner merely alleged in a conclusory fashion that the officers knew or should have known that the allegations against Krainski were false. *Id.* The panel suggested that in order to satisfy the pleading requirements under Fed. R. Civ. P. 8(a) and survive a motion to dismiss under 12(b)(6), Petitioner must set forth additional facts suggesting that the officers had

a reason to suspect the falsity of the statements made by the victim and two other university employees. *Id.* This ruling establishes a heightened pleading requirement that is inconsistent with Fed. R. Civ. P. 8(a) and this Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).

As is stated by Judge Betty B. Fletcher in her panel dissent, Krainski's complaint is more than mere legal conclusions or a recital of the elements of a cause of action. *Krainski* at 972. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. at 1949, citing *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. at 1965. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* In pleading her claim for violation of her Fourth Amendment rights, Krainski alleged more than the elements of her claim that university officers lacked probable cause to arrest her. Petitioner alleged that the university officers knew or should have known the allegations against Krainski were false. The Petitioner further alleged, in support of her claim that the university officers knew or should have known the allegations against Krainski were false, that the university officers conducted no investigation prior to arresting Krainski, and no physical evidence

of the attack alleged against Petitioner existed. *Krainski* at 972-973.

In her complaint, Krainski clearly set forth the factual basis for her claim against the university officers for violation of her Fourth Amendment rights, and asserted more than a legal conclusion or a recitation of the elements. Petitioner's allegations that the university officers knew or should have known the allegations against Krainski were false, that they conducted no investigation prior to arresting her, and that no physical evidence of the alleged attack perpetrated by Krainski existed, makes Petitioner's claim plausible on its face. As Judge Fletcher pointed out, Krainski's complaint explains not only the surrounding circumstance of her claim for violation of her Fourth Amendment rights such as where, when, and how the claim arose, but the precise manner in which the university officers lacked probable cause to arrest her. *Krainski* at 972-973. The panel's requirement that any additional factual pleading is required is contrary to this Court's decision in *Iqbal* and *Twombly*, and contrary to the notice pleading requirements of Fed. R. Civ. P. 8(a), thereby creating an incorrect interpretation of those pleading requirements in the Ninth Circuit.

The panel's decision is contrary to prior precedent, not only in other circuits, but in the Ninth Circuit. In *Baldwin v. Placer County*, 418 F.3d 966 (9th Cir. 2005), the Ninth Circuit established that police officers are only entitled to qualified immunity from § 1983 actions for violations of the Fourth

Amendment when a reasonable police officer would have believed the conduct alleged against him was legal. In this case, Krainski alleged in her complaint that the UNLV police officers knew or should have known their conduct was illegal when they arrested her without conducting an investigation, without any physical evidence of the charges against her, and without probable cause. No reasonable police officer would believe his conduct was legal if he arrested a suspect knowing the allegations against the suspect were false. *See Baldwin*, 418 F.3d at 970-971. Accordingly, Krainski's allegations against the UNLV police officers are clearly sufficient to survive the officer's qualified immunity defense with regard to a motion to dismiss.

The panel's decision is also clearly contrary to *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002), which states that the federal courts may not require a heightened pleading of improper motive in constitutional tort cases against individual officers. *Id.* at 1127. This Court further stated in *Galbraith* that "nearly all of the circuits have now disapproved any heightened pleading standard in cases other than those governed by Rule 9(b)." *Id.* at 1125. *See e.g. Educadores Puertorrequenos en Accion v. Hernandez*, 367 F.3d 61 (1st Cir. 2004); *Wynder v. McMahon*, 360 F.3d 73 (2nd Cir. 2004); *Thomas v. Independence Tp.*, 463 F.3d 285 (3rd Cir. 2006); *Goad v. Mitchell*, 297 F.3d 497 (6th Cir. 2002); *Walker v. Thompson*, 288 F.3d 1005 (7th Cir. 2002);

Hoskins v. Poelstra, 320 F.3d 761 (7th Cir. 2003); *Wilson v. Strong*, 156 F.3d 1131 (11th Cir. 1998).

While this case is clearly not one subject to Rule 9(b), the panel has nonetheless created a reported case that applies similar heightened pleading requirements to all civil rights cases filed in the circuit. The panel decision is contrary to this Court's intent in *Iqbal* and *Twombly*, thus respectfully requiring that the matter be addressed by this Court and to maintain uniformity among the circuits on this important issue.

B. This Court Should Grant Certiorari To Determine If The "Foman Factors" Remain A Requirement Under Rule 15(A) When A District Court Denies An Opportunity To Amend Claims "Without Any Justifying Reason."

In *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227 (1962), this Court held:

> Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant,

> repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, *but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.*

371 U.S. at 182, 83 S. Ct. at 230 (emphasis added); *see also Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99 (1957).

In this case, the District Court simply ignored Petitioner's motion to amend the complaint, and granted the motion to dismiss with prejudice. App. 26. In defending the District Court, the majority of the Ninth Circuit panel stated that Krainski "conceded that there were no new facts that she would include in the complaint" to overcome its perceived shortcomings. *Krainski* at 972. This conclusion by the panel is contrary to counsel's statements at oral argument. In fact, Petitioner's counsel argued:

> We certainly are aware of many more facts now than we were when we first drafted the complaint. So essentially, the allegations we could add to the complaint at this point is to be more specific about the actual conspiracy that took place, who it occurred between,

> what school officials were actually involved in this.

Id. at 973.

Realizing the errors of the panel majority, Judge Fletcher made clear in her dissent that even assuming Krainski's pleading was not sufficient to survive a motion to dismiss, that she could easily amend the complaint to "specify why and how the police 'knew or should have known, that the allegations [against her] were false.'" *Id.* Judge Fletcher stated that it is "easy to think of an amendment that could save the complaint." *Id.* Her dissent points out that the findings of the panel majority not only misconstrue the facts, but are directly in conflict with the Ninth Circuit's decision in *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). *Krainski* at 973.

More importantly to this Court, the Ninth Circuit's decision eliminates the factors established in *Foman*, allowing the District Courts in that circuit to ignore their requirement under Rule 15(a) to apply the factors. As in *Foman*, the District Court here issued just an "outright refusal to grant leave without any justifying reason." 371 U.S. at 182, 83 S. Ct. at 230 (emphasis added). Guidance is needed from this Court to determine how Rule 15(a) applies post-*Twombly* and *Iqbal*. Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 88-89 (2010).

While the complaint satisfied the pleading requirements and set forth facts sufficient to state a plausible claim, even if it was not, the Petitioner could easily amend the complaint to "specify why and how the police 'knew or should have known, that the allegations [against her] were false.'" *Krainski* at 972-973. For that reason, this Court should grant Certiorari to determine if the application of the Foman Factors remain mandatory on the district court's following this Court's decisions in *Twombly* and *Iqbal*.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEGAN KRAINSKI,

Plaintiff-Appellant,

v.

STATE OF NEVADA EX. REL. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, on behalf of University of Nevada, Las Vegas; REBECCA MILL; RICHARD CLARK; PHILLIP BURNS; NANNETTE JIMINEZ; SUSAN CARRASCO; TYREE PINI; LESLIE WALLENFELDT; BRETT GOFF; L. TRAMPOSCH; J. CULVER; KENYA POLEE,

Defendants-Appellees.

No. 08-17523

D.C. No. 2:08-cv-00417-JCM-GWF

OPINION

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued December 3, 2009
Submitted August 2, 2010
San Francisco, California

Filed August 2, 2010

Before: Betty B. Fletcher, Sidney R. Thomas and N. Randy Smith, Circuit Judges.

Opinion by Judge Thomas;
Partial Concurrence and Partial Dissent by
Judge B. Fletcher

COUNSEL

Jason Bach; Las Vegas, Nevada; for the appellant.

Richard C. Linstrom; Las Vegas, Nevada; Susan Carrasco O'Brien; Las Vegas, Nevada; Christian James Gabroy; Henderson, Nevada; for the appellees.

OPINION

THOMAS, Circuit Judge:

Megan Krainski appeals the district court's dismissal of her Section 1983 action against the University of Nevada, Las Vegas ("UNLV")[1] and various UNLV employees ("UNLV Employees")[2] in their personal and official capacities. Krainski alleges constitutional and state law violations arising from

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[1] State of Nevada ex. Rel. Board of Regents of the Nevada System of Higher Education, on behalf of the University of Nevada.

[2] The "University Employees" include Rebecca Mills, Vice President for Student Life; Richard Clark, Director of Student Conduct and Residential Life; Phillip Burns, Senior Student Conduct Officer; Nannette Jimenez, Student Conduct Officer; Susan M. Carrasco, Assistant General Counsel; Tyree Pini, Assistant Residential Life Coordinator; Leslie Wallenfeldt, Assistant Residential Life Coordinator; and UNLV police officers Brett Goff, L. Tramposch, and J. Culver.

an altercation with her former roommate, Kenya Polee, that led to Krainski's arrest and subjection to university discipline.[3] The district court dismissed Krainski's federal claims with prejudice and declined to exercise jurisdiction over the remaining state law claims. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

According to Krainski's complaint, Krainski and Polee roomed together in residential housing at UNLV. According to the complaint, Polee was "a prominent student-athlete at UNLV, listed on the University's website as 'the top long jumper for the Rebels . . . among the top long jumpers in the MWC (Mountain West Conference).'" Krainski's complaint states that her troubles began on September 10, 2007, when she met with Defendant Wallenfeldt and "advised her of ongoing harassing and threatening behavior" by Polee. Krainski alleges that, in

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[3] Krainski also named Polee as a defendant. Polee responded by filing a third-party complaint with cross-claims in which she sought to implead Yvonne Scott-Williams, head coach of the UNLV track team, as a third-party defendant. Polee alleged that UNLV and Williams wrongfully removed her from the track team and revoked her scholarship in retaliation for her defense of Krainski's lawsuit; she also sought a preliminary injunction reinstating her onto the track team. The district court dismissed Polee's federal claims and denied the motion for a preliminary injunction. We disposed of Polee's appeal in *Krainski v. Mill*, 356 Fed. App'x 951 (9th Cir. 2009) (unpublished).

"retaliation for her making a complaint against a star athlete":

> 27. On September 11, 2007, Defendants WALLENFELDT and PINI contacted Defendant POLEE, without Plaintiff's consent and in breach of confidentiality, and informed her of the allegations made by Plaintiff and conspired with Defendant POLEE to fabricate a story about Plaintiff attempting to attack POLEE with a pair of scissors, all before Plaintiff would have an opportunity to file a formal complaint against Defendant POLEE.
>
> 28. Defendants WALLENFELDT, PINI, and POLEE then contacted UNLV Police and made false statements to police officer [sic] in an attempt to have Plaintiff arrested.
>
> 29. Defendant Officers GOFF, TRAMPOSCH, and CULVER, knew, or should have known, that the allegations made by Defendant POLEE were false, but arrested Plaintiff for the alleged crime of Assault with a Deadly Weapon.
>
> 30. Prior to making the arrest, Defendant Officers GOFF, TRAMPOSCH, and CULVER did not conduct any investigation into the claims made by Defendant POLEE, and had no probable cause or warrant to arrest Plaintiff.

As a result of these actions, Krainski alleges that she was wrongly incarcerated, restricted of her liberty, and subjected to psychological harm.

Krainski further alleges that UNLV, Mills, Clark, Burns, Jimenez, and Carrasco then proceeded to wrongly initiate student disciplinary proceedings against her. Her complaint explains:

> 32. In October 2007, Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO brought formal charges against Plaintiff for alleged violations of the University of Nevada, Las Vegas Student Conduct Code. . . .
>
> 33. Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO failed to provide Plaintiff with proper notice of the formal hearing. . . .
>
> 34. Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO held a formal hearing on November 13, 2007, at which time they each failed to allow Plaintiff to be represented and/or assisted by her advisers, despite the explicit representation made by Defendants that Plaintiff would be allowed to be represented and/or assisted by said advisers, intentionally causing Plaintiff to be ineffective at representing herself at said hearing. . . .
>
> 35. Despite the fact that no evidence was ever presented to support any of the allegations made against Plaintiff, Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO found Plaintiff to be "Responsible" of said charges, completely ignoring the evidence that exonerated Plaintiff,

> forever tarnishing the educational transcript and record of Plaintiff, as well as causing severe psychological and physical injuries. . . .

Krainski alleges that the defendants' actions "depriv[ed] her of the opportunity to obtain an education and further her career."

Krainski raised three constitutional claims before the district court: procedural due process under the Fifth and Fourteenth Amendments; substantive due process under the Fifth and Fourteenth Amendments; and Fourth Amendment unlawful arrest and imprisonment. In addition to monetary damages, she sought "a Permanent Injunction, prohibiting the Defendants and their agents from placing a hold on her academic transcript or placing any notation of findings or sanctions against her in her student file or upon her transcript."

UNLV and the UNLV Employees subsequently filed a motion to dismiss Krainski's complaint. The district court granted the motion, reasoning that Eleventh Amendment immunity barred Krainski's constitutional claims against UNLV and the UNLV Employees in their official capacities, and that qualified immunity barred Krainski's federal claims against the UNLV Employees in their personal capacities. Additionally, the district court determined that Krainski failed to state a claim for violation of her Fourth Amendment rights, her substantive due process rights, and her procedural due process rights. After dismissing Krainski's federal claims with

prejudice, the district court declined to exercise jurisdiction over the remaining state law claims. This timely appeal followed.

II

The district court did not err in dismissing Krainski's claims against UNLV and the UNLV Employees in their official capacities, a decision we review de novo. *Yakima Indian Nation v. State of Wash. Dep't of Revenue*, 176 F.3d 1241, 1245 (9th Cir. 1999).

"The Eleventh Amendment bars suits against the State or its agencies for all types of relief, absent unequivocal consent by the state." *Romano v. Bible*, 169 F.3d 1182, 1185 (9th Cir. 1999) (citing *Pennhurst v. Halderman*, 465 U.S. 89, 100 (1984)). The Eleventh Amendment jurisdictional bar applies regardless of the nature of relief sought and extends to state instrumentalities and agencies. *See Papasan v. Allain*, 478 U.S. 265, 276 (1986).

Eleventh Amendment immunity also shields state officials from official capacity suits. *See Central Reserve Life of N. Am. Ins. Co. v. Struve ("Central Reserve")*, 852 F.2d 1158, 1160-61 (9th Cir. 1988). A narrow exception exists "where the relief sought is prospective in nature and is based on an ongoing violation of the plaintiff's *federal* constitutional or statutory rights." *Id.* at 1161 (emphasis in original); *see also Papasan*, 478 U.S. at 277-78; *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 660

(9th Cir. 2009) ("[A] plaintiff may . . . maintain a federal action to compel a state official's prospective compliance with the plaintiff's federal rights.") (citations omitted).

We conclude that the district court properly dismissed Krainski's claims against UNLV under the Eleventh Amendment. Krainski concedes that the Nevada University system and its constituent institutions are agencies and instrumentalities of the State of Nevada within the meaning of the Eleventh Amendment. *See Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 883 n.17 (9th Cir. 2004) (noting that the Nevada System of Higher Education is immune from suit under the Eleventh Amendment). Accordingly, the district court properly dismissed Krainski's claims against UNLV.

The district court also properly dismissed the claims against the UNLV Employees in their official capacities. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (clarifying that suits against state officials in their official capacity are no different from suits against the state itself).

Krainski also asserts a theory under *Monell* that her constitutional rights were infringed by a "de facto policy" of UNLV and the UNLV Employees. *See Monell v. Dep't of Social Servs. of N.Y.*, 436 U.S. 658, 690 n.55, 691 (1978). However, the Supreme Court has expressly declined to extend *Monell*'s theory of municipal liability under § 1983 to state entities. *Will*, 491 U.S. at 70-71. Accordingly, Krainski may

not bring an action against UNLV or the UNLV Employees in their official capacities under *Monell*.

III

The district court properly dismissed Krainski's constitutional claims against the UNLV Employees in their personal capacities on the basis of qualified immunity.

State officials are entitled to qualified immunity from suits for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Determining whether officials are owed qualified immunity involves two inquiries: (1) whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right; and (2) if so, whether the right was clearly established in light of the specific context of the case." *Al-Kidd*, 580 F.3d at 964 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal quotation marks omitted). "It is within our 'sound discretion' to address these two prongs in any sequence we see fit." *Al-Kidd*, 580 F.3d at 964 (quoting *Pearson v. Callahan*, ___ U.S. ___, 129 S. Ct. 808, 818 (2009)).

A

The district court properly concluded that UNLV police officers Goff, Tramposch and Culver violated Krainski's Fourth Amendment right to be free from warrantless arrest absent probable cause. A warrantless arrest must be supported by probable cause to comport with the Fourth Amendment. *Henry v. United States*, 361 U.S. 98, 102 (1959). "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that [an] offense has been committed." *Id.* "[E]ven if the officers were mistaken that probable cause to arrest . . . existed, they are nonetheless immune from liability if their mistake was reasonable." *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1443 (9th Cir. 1991) (citation and footnote omitted).

Here, Krainski herself admitted that UNLV police officers Goff, Tramposch and Culver arrested her pursuant to statements by Polee and two UNLV Residential Life Coordinators and other investigative information indicating that Krainski had attacked Polee with a pair of scissors. Krainski failed to allege in her complaint or at oral argument any facts suggesting that any of the officers had a reason to suspect the falsity of the statements made by the victim and two other university employees; instead, she merely alleged in a conclusory fashion that the officers "knew, or should have known, that the allegations . . . were false" and that they failed to conduct an adequate investigation. The record does not contain any information that would create a genuine

issue of material fact as to whether the officers had facts sufficiently detailed to cause a reasonable person to believe a crime had been committed and that Krainski was the perpetrator. We conclude that qualified immunity applies, as "a reasonable police officer could have believed that his or her conduct was lawful" when arresting a suspect following a report from two university employees and a student alleging an attack. We thus affirm the district court's dismissal of Krainski's Amendment Fourth cause of action against the UNLV Employees based on the defendants' entitlement to qualified immunity.

B

The district court did not err in concluding that qualified immunity precluded Krainski's substantive due process claims against the individual defendants. In order to determine the viability of a qualified immunity claim, we determine whether the defendants violated a constitutional right and whether the constitutional right was clearly established at the time of the defendants' actions. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Under *Pearson v. Callahan*, 129 S.Ct. 808, 821 (2009), we may begin the qualified immunity analysis by considering whether there is a violation of clearly established law without determining whether a constitutional violation occurred.

The guarantee of substantive due process provides "heightened protection against government interference with certain fundamental rights and

liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The "liberty" guaranteed by the Due Process Clause has yet to be fully circumscribed and presents "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes ... that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Raich v. Gonzales*, 500 F.3d 850, 862 (9th Cir. 2007) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)). "The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (citations omitted).

Krainski claims that her right of substantive due process was violated when a university official allegedly placed an unwarranted disciplinary notation on her transcript.[4]

To determine whether a constitutional right has been "clearly established" for qualified immunity purposes, we must "survey the legal landscape and examine those cases that are most like the instant case." *Trevino v. Gates*, 99 F.3d 911, 917 (9th Cir. 1996) (citations omitted). The inquiry "must be undertaken

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[4] The defendants dispute that any disciplinary notation was placed on her transcript, and Krainski has not placed the transcript into evidence.

in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201.

Krainski has been unable to present us with any binding or persuasive authority for the proposition that a substantive due process violation occurs when a university official places an unwarranted disciplinary notation on a transcript. The only case that has been cited to us as supporting that proposition is *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985). There, the Supreme Court considered a public university student's dismissal on academic grounds from a six-year degree program. *Id.* at 215-16. The Supreme Court denied the student's substantive due process claim on factual grounds, "assum[ing] the existence" of a constitutionally protected interest that derived from "an implied contract right to continued enrollment free from arbitrary dismissal." *See id.* at 223; *see also id.* at 228-29 (Powell, J., concurring) (arguing that it was "unnecessary to assume the existence" of such a "dubious" right). Krainski's case presents a weaker claim to substantive due process protection than in *Ewing*, as she does not allege that she was suspended or dismissed from the university, but merely that she received a disciplinary notation on her record. In the absence of any other precedent affirming a substantive due process violation under facts analogous to those here, we are compelled to conclude that the contours of the right Krainski asserts were not sufficiently clear that a reasonable official would understand that what he or she is doing violates that right. Accordingly, we affirm the district

court's dismissal of the claim on the basis of qualified immunity without reaching the underlying constitutional question.

C

Finally, Krainski alleges that UNLV and various UNLV Employees violated her procedural due process rights in connection with a school disciplinary hearing. Qualified immunity protects the school officials from these claims.

A procedural due process claim has two elements: deprivation of a constitutionally protected liberty or property interest and denial of adequate procedural protection. *Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998).

As we have previously noted, the doctrine of qualified immunity protects state actors when the constitutional right at issue was not "clearly established" at the time of the actions at issue. *Saucier*, 533 U.S. at 202. Here, the law was not clearly estalished that the type of injury Krainski alleges constituted a constitutionally protected "liberty" or "property" interest.

The Supreme Court has had occasion to consider this threshold inquiry in several cases. First, in *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court held that temporary suspensions of public high school students without notice or a hearing implicated the students' protected interest in "avoid[ing] unfair or

mistaken exclusion from the educational process, with all of its unfortunate consequences." *Id.* at 576. The Court reasoned that, "[h]aving chosen to extend the right to an education to people of appellees' class generally, [the state] may not withdraw that right on grounds of misconduct absent, fundamentally fair procedures to determine whether the misconduct has occurred." *Id.* at 574.

In *Board of Regents v. Roth*, the Supreme Court held that an assistant professor without tenure at a state university had no constitutionally protected liberty or property interest in his continued employment by the university. 408 U.S. 564, 569 (1972). In so holding, the Court observed in dicta that there was "no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Id.* at 573.

Finally, in *Paul v. Davis*, the Supreme Court expressly circumscribed the reach of both *Roth* and *Goss* and held that "reputation alone, apart from some more tangible interests," does not constitute "'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." 464 U.S. 693, 693, 701, 709-10 (1976); *see also WMX Technologies, Inc. v. Miller*, 80 F.3d 1315, 1319 (9th Cir. 1996) (announcing that *Paul* established a "stigma-plus test"). The plaintiff in *Paul* had challenged the dissemination to hundreds of merchants by police of a flyer listing him as an "active shoplifter" and

depicting his image. 464 U.S. at 695-96. Although he alleged that the "shoplifter" designation would damage his reputation and "seriously impair his future employment opportunities," the Supreme Court held that he did not state a claim for violation of his procedural due process rights. *Id.* at 697, 711-12.

Here, Krainski does not allege that the UNLV Employees suspended or expelled her for her conduct, or that she was otherwise deprived of an entitlement to education conferred by the state or secured by some other independent source or understanding. She instead alleges that the defendants damaged her reputation by charging her with violations of the Student Conduct Code; finding her "Responsible" of those charges; and "tarnishing [her] educational transcript and record." Such allegations amount to mere reputational injury within the meaning of *Paul* and, without more, do not rise to the level of a deprivation of a constitutionally protected liberty or property interest. Krainski's allegation of "loss of future income" is materially indistinguishable from the *Paul* plaintiff's assertion that the defamatory flyer would "impair his future employment opportunities." Likewise, allegations of "psychological trauma" are not sufficient to satisfy *Paul*'s "stigma-plus" test. *Rolon v. Henneman,* 517 F.3d 140, 148 (2d Cir. 2008) (humiliation, embarrassment, and emotional distress are not cognizable protected interests under *Paul*). Nor are or [sic] conclusory suggestions of the "loss of liberty." *Sprecher v. Graber,* 716 F.2d 968, 976 (2d Cir. 1983)

(speculative allegations as to loss of liberty insufficient). Thus, without opining as to the constitutionality of the conduct, we can easily conclude that the law was not clearly established at the time so as to put a reasonable official on notice that the actions might violate the constitution.

The district court properly granted judgment against Krainski on her claim for violation of procedural due process rights.[5]

IV

The district court did not abuse its discretion in denying Krainski leave to amend her complaint. *United States v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051 (9th Cir. 2001) (citation omitted). "Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). To survive a motion to

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[5] Krainski did not suggest in her complaint, her briefing, or at oral argument that the absence of counsel at the disciplinary hearing violated the constitution. At oral argument, she admitted that the defendants permitted an attorney to attend the hearing with her and conceded that she was not arguing that she was entitled to representation at the hearing. Therefore, the First Circuit's decision in *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978), is inapposite to the circumstances presented here, and we decline to address the circumstances raised in that case.

dismiss, a complaint must contain sufficient factual matter to state a facially plausible claim to relief. *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). Here, Krainski conceded that there were no new facts that she would include in her complaint to overcome its shortcomings. Under the circumstances, we conclude that the district court did not abuse its discretion in denying Krainski leave to amend her complaint.

AFFIRMED.

B. FLETCHER, Circuit Judge, concurring in part and dissenting in part:

The district court erred by dismissing Krainski's Fourth Amendment claim and abused its discretion by dismissing the complaint without leave to amend. I therefore respectfully dissent from the portion of the majority's opinion that affirms the district court's decision in those respects.

If the UNLV police officers who arrested Krainski knew or should have known that the allegations against her were false, the police officers would have violated the Fourth Amendment's clearly established prohibitions. *See Baldwin v. Placer County*, 418 F.3d 966, 970-71 (9th Cir. 2005). The majority, however, deems Krainski's Fourth Amendment claim too conclusory to survive.

Krainski's complaint is more than "legal conclusions" or a "recital[ ] of the elements of a cause of action," *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 1950 (2009), because she alleges more than simply that UNLV police lacked probable cause to arrest her. She alleges in some detail the factual circumstances under which the arrest took place. *See* Majority Op. at 11102-03. She also alleges facts that explain *why* the police lacked probable cause – namely, that the police "knew, or should have known, that the allegations [against her] were false."

That allegation is enough to satisfy Federal Rule of Civil Procedure 8(a) and to survive a motion under Rule 12(b)(6). The Supreme Court has expressly approved as adequate an analogous complaint alleging negligence. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 n.4 (2002) (quoting Fed. R. Civ. P. app. Form 9 (2000)). "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." Fed. R. Civ. P. app. Form 9.[1] Just as Krainski's complaint does with respect to her Fourth Amendment claim, Form 9 sketches the factual circumstances out of which the legal claim for negligence arose – when, where, and in general terms, how the claim arose. But Krainski's complaint alleges more, for she

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[1] "The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." Fed. R. Civ. P. 84.

explains not only the surrounding circumstances but the precise manner in which the police lacked probable cause to arrest her. Form 9, by contrast, simply alleges negligence without specifying *why* the driver was negligent (by driving too quickly, for example, or by being distracted). Krainski has adequately stated a claim for a violation of the Fourth Amendment.

Even if the majority were right that Krainski's Fourth Amendment allegations are conclusory, it would still be wrong to affirm the district court's dismissal without leave to amend.

The district court did not even address Krainski's request to amend her complaint. Because "[a] district court's failure to exercise discretion constitutes an abuse of discretion," *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1027 (9th Cir. 2007) (citation and quotation marks omitted), we should at least remand, requiring the district court to exercise its discretion one way or the other.

More importantly, it is easy to think of an amendment that could save the complaint from the majority's strictures – Krainski could specify why and how the police "knew, or should have known, that the allegations [against her] were false." The majority rightly acknowledges that "[d]ismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." Majority Op. at 11113 (quoting *Thinket*

Ink Info Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1061 (9th Cir. 2004)). Here it is clear that the complaint *could* be saved by amendment, even under the majority's evaluation of the current complaint. Krainski is entitled to an opportunity to cure any inadequacies in the complaint.

The majority wrongly asserts that Krainski conceded there were no new facts that she could use to save her complaint. At oral argument, when asked about how he could amend the complaint, counsel for Krainski stated:

> We certainly are aware of many more facts now than we were when we first drafted the complaint. So essentially, the allegations we could add to the complaint at this point is to be more specific about the actual conspiracy that took place, who it occurred between, what school officials were actually involved in this.

Oral arg. at 4:46-5:10. Part of the alleged conspiracy, of course, was the fact that the police officers who made the arrest knew or should have known that the allegations against Krainski were false. Counsel was thus telling us that he could be "more specific" about how and why the police officers knew or should have known the allegations to be false. The majority posits a concession that was never made.

Krainski is entitled to discovery to substantiate the Fourth Amendment claim she properly alleges in

her complaint; prepared to allege additional facts, she should also be allowed to amend her complaint.[2] I therefore dissent.

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[2] I note specifically that her due process claim – that she was not allowed representation at the disciplinary hearing while criminal charges were pending against her – could be more explicitly stated in an amended complaint. *See Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978).

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MEGAN KRAINSKI,

Plaintiff,

vs.

THE STATE OF NEVADA ex rel. BOARD OF REGENTS OF NEVADA SYSTEM OF HIGHER EDUCATION, on behalf of THE UNIVERSITY OF NEVADA, LAS VEGAS; a Political Subdivision of the State of Nevada; REBECCA MILLS, individually and as Vice President for Student Life of the University of Nevada, Las Vegas; RICHARD CLARK, individually and as Director of Student Conduct and Residential Life of the University of Nevada, Las Vegas; PHILLIP BURNS,

CASE NO. 2:08-cv-00417-JCM-GWF

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT UNIVERSITY AND UNIVERSITY DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT (#33) AND MOTION FOR SANCTIONS (#34), AND DEFENDANT POLEE'S MOTION TO DISMISS (#36)

(Filed Oct. 20, 2008)

individually and as Senior Student Conduct Officer of the University of Nevada, Las Vegas; NANNETTE JIMENEZ, individually and as a Student Conduct Officer of the University of Nevada, Las Vegas; SUSAN M. CARRASCO, individually and as Assistant General Counsel of the University of Nevada, Las Vegas; TYREE PINI, individually and as Assistant Residential Life Coordinator; LESLIE WALLENFELDT, individually and as Assistant Residential Life Coordinator of the University of Nevada, Las Vegas; OFFICR [sic] BRETT GOFF, P#302, individually and as a police officer with the University of Nevada, Las Vegas Police Department; OFFICER L. TRAMPOSCH, P#312, individually and as a police officer with the University of Nevada, Las Vegas Police Department; OFFICER J. CULVER, P#309, individually and as a police officer with the University of Nevada, Las Vegas Police Department; KENYA POLEE, individually; DOES I-XX, inclusive.

Defendants.

Defendant University[1] and University Defendants'[2] Motion to Dismiss Plaintiff's Complaint (Document #33) and Motion for Sanctions (Document #34), along with Defendant/Counter-Plaintiff/Cross-Plaintiff Kenya Polee's Motion to Dismiss Plaintiff's Complaint (Document #36) came before this Court for hearing on October 14, 2008, with Jason Bach, Esq., appearing for Plaintiff Megan Krainski, Vice President and General Counsel Richard C. Linstrom appearing for the University and University Defendants, and Christian James Gabroy, Esq., appearing for Defendant/Counter-Plaintiff/Cross-Plaintiff Polee. After reviewing the pleadings submitted in support of and in opposition to these motions, having heard

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[1] The State of Nevada ex rel. Board of Regents on behalf of the Nevada System of Higher Education, on behalf of the University of Nevada, Las Vegas.

[2] Rebecca Mills, individually and as Vice President for Student Life of the University, Richard Clark, individually and as Director of Student Conduct and Residential Life of the University; Phillip Burns, individually and as Senior Student Conduct Officer of the University; Nannette Jimenez, individually and as a Student Conduct Officer of the University, Susan M. Carrasco, individually and as Assistant General Counsel of the University; Tyree Pini, individually and as Assistant Residential Life Coordinator of the University; Leslie Wallenfeldt, individually and as Assistant Residential Life Coordinator of the University; Officer Brett Goff, P#302, individually and as a police officer with the University's Police Department; Officer L. Tramposch, P#312, individually and as a police officer with the University's Police Department; and Officer J. Culver, P#309, individually and as a police officer with the University's Police Department.

argument of counsel and having reviewed the Court's file, and for good cause shown.

IT IS HEREBY ORDERED that Defendant University and University Defendants' Motion to Dismiss Plaintiff Krainski's Complaint (Document #33) and Motion for Sanctions (#34), as well as Defendant Polee's Motion to Dismiss (Document #36) are granted in part and denied in part. Each of Plaintiff's federal claims against the University and University Defendants are hereby dismissed with prejudice. The Court finds that Eleventh Amendment immunity bars such claims against the University, as a state entity, and the University Defendants, as state employees thereof acting in their official capacities. The Court further finds the University Defendants to be entitled to qualified immunity in their individual capacities as to their actions as alleged by Plaintiff. The Court also finds that Plaintiff failed to make out claims for violation of Fourteenth Amendment procedural due process, having alleged that she received some notice and a hearing, or substantive due process, having failed to allege violation of a cognizable fundamental liberty or property interest, or violation of the Fourth Amendment relative to search and seizure, having pled facts constituting probable cause to arrest her by the police officer defendants employed by the University. Having hereby dismissed Plaintiff Krainski's federal claims with prejudice, the Court declines to exercise jurisdiction over the remaining state law claims and therefore hereby dismisses such claims without

prejudice to Plaintiff's right to bring them in state court. Having made the above findings of fact and conclusion of law, the Court hereby denies the Motion for Sanctions (#34) as moot and denies Defendant/ Counter-Plaintiff/Cross-Plaintiff Kenya Polee's Motion to Dismiss Plaintiff's Complaint (#36), as Ms. Polee is not an employee of the University.

DATED this 17th day of October, 2008.

/s/ James C. Mahan
JAMES C. MAHAN
UNITED STATES
DISTRICT COURT JUDGE

Submitted By:

By: /s/
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEGAN KRAINSKI, Plaintiff-Appellant, v. STATE OF NEVADA EX. REL. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, on behalf of University of Nevada, Las Vegas; REBECCA MILL; RICHARD CLARK; PHILLIP BURNS; NANNETTE JIMINEZ; SUSAN CARRASCO; TYREE PINI; LESLIE WALLENFELDT; BRETT GOFF; L. TRAMPOSCH; J. CULVER; KENYA POLEE, Defendants-Appellees.	No. 08-17523 D.C. No. 2:08-cv-00417-JCM-GWF District of Nevada, Las Vegas ORDER (Filed Sep. 10, 2010)

Before: B. FLETCHER, THOMAS and N.R. SMITH, Circuit Judges.

Judges Thomas and NR Smith have voted to deny the petition for rehearing and to reject the petition for rehearing en banc. Judge B Fletcher voted to grant the petition for rehearing and has recommended granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are rejected.